Supreme Court, U.S.
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No. 00-1714

In The

Supreme Court of the United States

C. DOLORES TUCKER and
WILLIAM TUCKER, her husband,

Petitioners,

v.

RICHARD S. FISCHBEIN; TIME, INC.;
BELINDA LUSCOMBE; NEWSWEEK MAGAZINE,
and JOHNNIE ROBERTS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Why the petition for certiorari of C. Delores Tucker and William Tucker should be denied and the petition for certiorari of respondent Richard S. Fischbein should be granted?

PARTIES TO THE PROCEEDINGS

(Rule 14.1(b) Statement)

Petitioners

Petitioners are C. Delores Tucker and William Tucker.

Respondent

Respondent for this opposition is Richard S. Fischbein.

BRIEF IN OPPOSITION

Respondent Richard S. Fischbein respectfully submits this opposition to the writ of certiorari of petitioners C. Delores Tucker and William Tucker to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 9, 2001. The Third Circuit Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing *en banc* on February 14, 2001.

The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Among other constitutional and statutory provisions, this case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARGUMENT

Respondent Richard S. Fischbein ("Fischbein") respectfully submits this opposition/counter-statement in order to clarify that he has previously filed a petition for a writ of certiorari with respect to the same judgment from which the petitioners C. Delores Tucker and William Tucker ("petitioners" or the "Tuckers") herein have filed the instant petition. In his petition, Fischbein contends that the writ should be granted as to him because: (a) his allegedly defamatory statement was an opinion based upon fully disclosed facts, and as such was constitutionally protected under the First Amendment; (b) his allegedly defamatory statement was also privileged commentary by a party (and attorney) to a litigation about that litigation; and (c) reversal by the Third Circuit of the district court's award of summary judgment on the grounds that the Tuckers, public figures, could establish actual malice by clear and convincing evidence was contrary to established Supreme Court precedent. Accordingly, Fischbein believes that the Tuckers' petition for a writ of certiorari should be denied, but the separate petition for writ of certiorari by Fischbein should be granted.

Fischbein shall not repeat the arguments advanced by him in support of his petition for a writ of certiorari in this response. However, one marked contrast between his and the Tuckers' petition bears noting. While the Tuckers seek to have the Court review primarily issues of Pennsylvania defamation law, Fischbein seeks review of a significant First Amendment issue. Fischbein – the only remaining defendant in this action after the Third Circuit decision – is further cognizant that the Tuckers' petition for a writ of certiorari is targeted at those defendants in whose favor the Third Circuit affirmed summary judgment dismissing the complaint. Consequently, this response only briefly addresses the arguments raised by the Tuckers to the extent that they impact upon Fischbein.

The Tuckers' suggestion that the trial and appellate Courts erroneously construed certain record evidence "out of context" is not an issue that rises to a constitutional level. Moreover, the undisputed fact remains that the Tuckers' counsel admitted in deposition testimony that loss of consortium can include loss of sexual relations, and that the Tuckers' original and amended complaint had been drafted to encompass any viable claim. Even absent such an admission, however, for the reasons stated in Fischbein's petition for a writ of certiorari, and for the reasons stated by Judge Nygaard of the Third Circuit in his thoroughly reasoned dissenting opinion, the record was replete with evidence that the Tuckers' loss of consortium claim never unequivocally excluded damages for loss of sexual relations during the relevant time period, including the period following the service of the first amended complaint, and was always susceptible to a contrary construction as a matter of law.

The Tuckers' contention that the panel failed to address specific Supreme Court, Third Circuit, and Pennsylvania State law cases is without merit. The panel acknowledged that Pennsylvania law controls. And the Tuckers' reliance on the case of *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991) is misplaced. In *Masson*, unlike here, the author had misquoted taped interviews with the plaintiff in numerous passages contained in a series of non-fiction articles where the reader was likely to interpret them as verbatim conversation.

As to Fischbein, the precedent cited by the Tuckers is factually distinguishable from the case at bar. In none was the alleged defamatory statement one of opinion based upon fully disclosed facts. Also, in Fischbein's case, the statement was privileged commentary made by a party to a litigation, not by a reporter. As demonstrated in Fischbein's petition for a writ of certiorari, the complaint should have been dismissed as against him on account of these undisputed facts. As further demonstrated in Fischbein's petition, the Third Circuit ignored longstanding precedent precisely on point when it selectively upheld the award of summary judgment against the other defendants, but failed to dismiss against him. Therefore, Fischbein's separate petition for a writ of certiorari should be awarded, but the instant petition by the Tuckers should be denied.

CONCLUSION

For the reasons stated above, Fischbein's petition for a writ of certiorari should be granted and the Tuckers' petition denied.

Respectfully submitted,

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